Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the matter of	)	
	)	
Interpretation of the terms "Multichannel Video Programming Distributor" and "Channel" as Raised in Pending Program Access Complaint Proceeding	)	MB Docket No. 12-83

REPLY COMMENTS OF PUBLIC KNOWLEDGE

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INTRODUCTION AND SUMMARY

The commenters in this proceeding have put forth a variety of legal and policy arguments both for and against the Commission recognizing that certain online providers can be multichannel video programming distributors (MVPDs). Certain misconceptions seem common among many commenters opposed to this pro-competitive action. These reply comments will briefly address these concerns as well as addressing related matters.

First, even supporter's of the Media Bureau's initial interpretation that provision of multiple, physical conduits to the home similar to 1984-style analog cable channels is the *sine qua non* of MVPD status concede that there is nothing in the plain language of the statute that compels such an interpretation.[1] Not only—as Public Knowledge, DirecTV, and AT&T observed in their initial comments—would such an interpretation would exclude many existing MVPDs, it would require the FCC to make constant arbitrary distinctions as to what does or doesn't constitute a "transmission path" and how much of the transmission path must an entity provide to win MVPD status. How would the FCC distinguish, for example, Sky Angel's physical facilities at the beginning of its transmission path where it receives the programming and the box it provides users to decode the programming from, for example, a DBS provider leasing a transponder on a satellite and using the "public airwaves" to transmit programming to a satellite receiver dish? Why is transmission

[1] Comments of Comcast in MB Docket No. 12-83 (May 14, 2012), at 8 (asking the Bureau to disregard the "untidiness" of the statutory language because "the intention was plain and universally understood"). Comcast's argument is somewhat undercut, however, by its insistence that this "plainly understood" meaning applied only to DBS, when the statute explicitly states otherwise. *Id.*

of programming to cable headends via satellite permissible, but transmission through the Internet "cloud" is not? Will Verizon Wireless become an MVPD if it offers subscribers an option to stream Time Warner Cable's video service, because it is now Verizon Wireless offering the "channel"?

It is far more sensible, and more in keeping with both the statutory language and the Legislative intent, to use the functional definition of MVPD urged by PK and others. The interpretation urged by the cable incumbents invites arbitrary distinctions that will only increase confusion and chill innovation and investment as the market increasingly embraces digital technologies.

Second, nothing in this proceeding would impact cable-specific regulation nor would Sky Angel or similar MVPDs acquire cable-specific obligations. Comcast's inexplicable but undoubtedly sincere concern that its would-be rivals will be crushed by the unbearable burdens that only a facilities based provider can endure is touching, but unwarranted.[2] Likewise, the somewhat more understandable concern from content providers with regard to preserving retransmission consent revenues, or from existing online tech companies that they will be transformed into MVPDs, is equally unwarranted.

On the other extreme, certain existing incumbents argue that a finding for Sky Angel will lower the barriers to competition and unleash competition "disruptive" to existing industry arrangements is somewhat more substantive. Accordingly, they argue for a definition that will suitably shackle new entrants and preserve the status quo. While PK wishes it could share the optimistic view of some commenters that

[2] Comcast Comments at 10-13.

the barriers to entry will drop so low that *anyone* could start a competing MVPD,[3] the cost of programming and other factors seem likely to keep out many would-be competitors.

Section 628 and the 1992 Act generally were intended to facilitate precisely the kind of "disruptive" competition these incumbents fear. It does not, as the incumbents suggest, provide free programming. It does not even provide the kind of price-control subsidy cable operators enjoy under the pole attachment rules. It simply gives those online distributors that want to provide MVPD services a level playing field on which to compete. The FCC should honor the Congressional intent to promote such "disruptive" competition by adopting a non-facilities based definition of "MVPD."

Finally, if the Bureau determines that "MVPD" and "channel" are ambiguous, it should refer the matter *en banc* to the Commission because the Bureau does not have the authority to decide novel questions of law.

I. There is No Requirement That an MVPD Must Provide a Complete Physical Transmission Path to a Viewer—Especially Since Such a Requirement Might Exclude Traditional MVPDs.

The law does not require that an MVPD must provide the entire "transmission path" that takes service to the customer, and arguing otherwise leads to absurd results. Syncbak is correct to observe that most ISPs do not provide a complete transmission path to a consumer's home: the last step of an Internet connection is typically provided over user-provided WiFi or ethernet.[4] Similarly, the last step of a cable "transmission path" may be home wiring provided by the subscriber or

[3] Comments of Cablevision in MB Docket No. 12-83, at 4 (May 14, 2012).
[4] Comments of Syncbak in MB Docket No. 12-83, at 8-9 (May 14, 2012).

building owner and not over wires provided by a cable operator. Homes and apartment buildings, for example, may be built with coaxial wiring preinstalled. Furthermore, cable systems have historically not provided "end to end" transmission of programming—leased satellite transmission capacity and other means are often part of the transmission path. And as MVPDs increasingly provide services to subscribers "over the top"—through video streaming apps, initiatives like TV Everywhere, and so forth—it becomes even more difficult to hold on to a requirement that MVPDs provide "transmission" as well as content.[5]

These issues illustrates the problems that arise from an overly physicalistic view of a "channel"—*e.g.*, suddenly a cable provider is not an MVPD—and argues against the Bureau creating a non-statutory requirement that MVPDs must provide a "transmission path," however conceived. Under this supposed "plain meaning" of the statute, the Commission will increasingly be required to make and justify arbitrary distinctions over what physical facilities an MVPD must provide. Is it sufficient that Sky Angel has physical facilities where it receives satellite distributed programming and transmits this to subscribers, who must have a physical box to decode the channels? It is hard to distinguish this from providers using wireless transmission, such as Wireless Cable providers and DBS providers, except that Sky Angle uses the Cloud and DBS provider use the public airwaves.

Such an interpretation would also raise questions where a wireless provider such as Verizon Wireless offers a video service. If what matters is the physicality,

[5] Also, as PK argued in its initial comments, there is no reason to conclude that wireless services such as DBS provide a transmission path to consumers. Radio broadcasting does not involve any sort of physical "path."

not the nature of the programming, then Verizon Wireless' Viewdini service would appear to be an MVPD service because it aggregates multiple "video programming" which it provides through wireless channels. But Sky Angel, which actually pays to acquire programming and which maintains its own facilities, would not be an MVPD. This obviously absurd result—and resulting confusion—is best avoided by adopting a definition of MVPD that relies on what consumers commonly understand as a programming channel rather than on artificial distinctions not found in the statute.

Nevertheless, to the extent that the Bureau does decide to impose such a requirement, there is still no reason that online services cannot qualify as MVPDs. Syncbak is further correct that online services, as much as traditional cable systems, can be viewed as providing "transmission paths" to viewers' homes. In the case of online MVPDs, the transmission paths are composed of multiple physical and logical links. As PK argued in its comments,[6] there is no requirement that an MVPD provide a complete *physical* transmission path to a viewer—especially since such a requirement might exclude many traditional MVPDs. Thus the recognition that logical links would satisfy any transmission path requirement settles the issue that online services can qualify as MVPDs.

II. The Proper Reading of "MVPD" Does Not Affect Cable-Specific Regulation.

As Public Knowledge (PK) discussed in its comments,[7] the statute and Commission regulations use the word "channel" differently in different contexts. Thus, if the Bureau does hold that an online service can be an MVPD and finds that

[6] Comments of Public Knowledge in MB Docket No. 12-83, at 10 (May 14, 2012).
[7] Comments of Public Knowledge at 2-15 (May 14, 2012).

the word "channel" in the definition of MVPD does not refer to a specific physical transmission path, there would be no effect on any provisions that plainly do use the word channel to refer to a communications path and not to programming. In particular, when the statute speaks of "channel capacity," it is apparent that Congress intended the phrase to refer to capacity and not programming.[8]

Thus, what the Bureau does in this context will have no effect on rules about public, educational, or governmental (PEG) use of cable systems (nor on the question of who may qualify as a cable system as opposed to the broader category of MVPD). Nor will it impact franchise fees, pole attachment rates, or any other obligations or privileges uniquely assigned to the cable industry. The argument that adoption of a definition of MVPD that would somehow alter the regulatory status of existing cable systems, or that Sky Angel or other MVPDs using broadband to bring programming to the home of the viewer would find themselves subject to cable-specific regulations, is utterly unfounded.

III. Although A Decision For Sky Angel Will Lower Barriers To Entry and Spur Competition, The Cost of Programming and Other Obligations Associated With MVPD Status Will Still Limit Entry.

Cablevision is representative of commenters that urge the Commission to avoid the disruption that would stem from clarifying what services are MVPDs. It writes:

> De-coupling MVPD status from facilities ownership or control would effectively enable anyone to leverage the offering of a handful of amateur video clips into a right to demand access to high quality programming networks, a change of such far-reaching consequences for the video distribution and programming industries that it cannot be the correct interpretation of the term.[9]

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[8] *See* 47 U.S.C. § 531.

[9] Comments of Cablevision in MB Docket No. 12-83, at 4 (May 14, 2012).

Because the notice primarily raised issues of statutory interpretation, it is not initially clear what weight the Bureau should give such concerns. Here, Congress has created a broad category (multichannel video programming distributors) that unambiguously includes online providers that offer content via "channels," and the Bureau has no choice but to give effect to Congressional intent. Standard tools of statutory interpretation, including consulting the legislative history to the extent that it is necessary to clarify Congressional intent, suffice.

Thus, in some respects, Cablevision's concern is simply irrelevant. But when considering that Congressional intent to improve competition is clearly concordant with good policy, the issues Cablevision raises become relevant because the "harm" that Cablevision foresees is actually in the public interest. The "far-reaching consequences" it complains of are nothing more than the salutary effects of competition. Anyone *should* be able to start an MVPD. Nothing the Bureau does would somehow give online providers content for free or on terms that are somehow more favorable than those Cablevision itself enjoys—online MVPDs will have capital and content costs like any others.

The regulatory implications of clarifying who may be an MVPD may be profound. While none of the MVPD-related *statutes* raise any problems, the Commission will have to update many of its implementing rules to account for the full technological variety of different kinds of MVPDs.[10] But contrary to some commenters, the results

[10] One issue the Commission will have to grapple with relates to geography. An online MVPD, of course, has nationwide footprint like satellite, rather than a local footprint like cable. If such an MVPD carries a broadcast signal, should it only be allowed to make that signal available to its original market? Why should the Commission extend legacy requirements that stem from the physically local nature

of this clarification will not simply be a boon for online operators (and consumers), since there are regulatory obligations as well as benefits that attend MVPD status. As the Bureau summarized:

> The regulatory benefits of MVPD status include the right to seek relief under the program access rules and the retransmission consent rules. Among the regulatory obligations of MVPDs are statutory and regulatory requirements relating to program carriage, the competitive availability of navigation devices (including the integration ban), the requirement to negotiate in good faith with broadcasters for retransmission consent, Equal Employment Opportunity ("EEO") requirements, closed captioning and emergency information requirements, various technical requirements (such as signal leakage restrictions), and cable inside wiring requirements.[11]

Given this array of regulatory obligations, the choice to become an online MVPD is not an easy one. In addition to capital and funding the entity must be willing to operate in a regulated environment. But since entities like Sky Angel have shown they are willing to do this, the Commission's rules should not prevent them from providing a dose of healthy disruption to the video market.

IV. The Bureau Should Refer the Matter *En Banc* to the Commission if the Bureau Finds That "MVPD" and "Channel" are Ambiguous Because the Bureau Lacks Delegated Authority to Decide Novel Issues of Law.

PK does not concede that the definition of MVPD or channel is ambiguous because the evidence so strongly suggests a technology-neutral reading. Nevertheless the very existence of this proceeding shows that these definitions are, at least, controversial. If the Bureau does decide that the relevant terms are

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of broadcast and cable to the online world? *See* Comments of M3X Media in MB Docket No. 12-83, at 7-9 (May 14, 2012) (initiating this discussion).

[11] Media Bureau Seeks Comment on Interpretation of the Terms "Multichannel Video Programming Distributor" and "Channel" as Raised in Pending Program Access Complaint Proceeding, Public Notice, DA 12-507, ¶2 (Mar. 30, 2012).

ambiguous, PK urges the Bureau to refer the matter *en banc* to the Commission, since the Bureau lacks the delegated authority to decide novel issues of law.[12]

Ambiguous terms in the Communications Acts represent implicit delegations of authority from Congress to the Commission to "fill in the gaps" with its policy expertise.[13] As PK discussed at length in its comments the sound policy in this case favors competition and not unnecessary technology-drawn barriers to entry. Thus if the Commission finds it necessary to clarify an ambiguous term where Congressional intent is not clear, it should do so in the only way that benefits the public by finding that online providers can be classified as MVPDs.

CONCLUSION

For the reasons above and in PK's initial comments, the Commission should find that online services that offer multiple channels of video programming fall within the statutory definition of "multichannel video programming distributor."

Respectfully submitted,

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[12] *See* 47 CFR § 0.283(c) (matters that present novel questions of law, fact or policy that cannot be resolved under existing precedents and guidelines must be referred to the Commission en banc, rather than the Chief of the Media Bureau, for disposition).

[13] *See* Comments of Public Knowledge at 23, citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843-44 (1984).